In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 907

THE CONOLON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-13) is not yet officially reported. The Board's Decision and Order (Pet. App. 14-38) are reported at 175 NLRB No. 9.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1970. The petition for a writ of

certiorari was filed on October 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer violated the National Labor Relations Act by denying overtime to an employee because of his union activity, by discriminatorily enforcing a no-solicitation rule to deter union activity, and by promising a wage increase to induce the employees to vote against the union in a scheduled Board election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 1-2).

STATEMENT

A. The Board's Findings of Fact

In June, 1967, the Board conducted a representation election among the production and maintenance employees at the Santa Ana, California, plant of the Conolon Corporation (the Company) (Tr. 122).[1] Following consideration of the Union's[2] objections to

---

[1] "Tr." references are to the transcript of the hearing before the Trial Examiner.

[2] Industrial Union of Marine and Ship Building Workers of America, AFL-CIO.

Company conduct affecting the results of that election, the Board on September 20, 1967, set the election aside and directed that a new one be held (Pet. App. 21-22).

On November 2, 1967, Company President Ashby told the assembled employees that a wage survey had recently been made and that they would receive a wage increase of 10 cents an hour effective October 28. At the same meeting, Ashby further stated that another survey would be made sometime after the first of the year and, if necessary, wage rates would be changed again. (Pet. App. 32; Tr. 114, 116, 143, 190.)

During November, employee Laurence Jones complained to Executive Vice President Barrie about his wages and progress since his recent return to the Company from military duty. Barrie told Jones that jobs were opening up, and that if Jones put his nose to the grindstone, did a good job, and made an attempt to learn the business, there was a future for him with the Company. During the discussion Jones indicated that he had attended union meetings because he was interested in hearing all sides of the story and that he had no feelings at that time one way or the other, to which Barrie replied that he knew Jones had a significant influence among the employees and that, if Jones were for the Company, he would "be able to move up in position." (Pet. App. 6; Tr. 37-39.)

The new election was scheduled for December 15. On December 14, one of the employees brought to the plant some white shirts with the words "Vote Yes" on the back. That afternoon, Jones put on one of the

shirts. Soon thereafter, Barrie confronted Jones and said, "I see you picked your side." Jones replied that he had no other choice at that time. Later in the day, Supervisor Handler told Jones that he was to leave that day at 3:30 p.m., since there was no overtime work because no rods were being shipped from the specialty department.[3] Jones responded that he was being sent home because he was wearing a union shirt, and asked to see Barrie. At their subsequent meeting Barrie told Jones that he had the wrong idea, that he was being sent home because of production, and added that, since there was a shortage of materials with which to construct the metal cases in which the specialty rods were packaged, there was no point in producing rods. During the conversation Barrie told Jones that he would like to see him "take that shirt off." (Pet. App. 2, 27; Tr. 40-45, 159.)

On December 13, President Ashby delivered an anti-union speech from 3:15 to 3:25 p.m. The Company permitted night shift employees, who did not normally commence work until 3:45 p.m., to punch in prior to the meeting. Day shift employees, whose normal quitting time was 3:30 p.m., had not punched out when the speech commenced. Following the speech, employee Mitsuko Roberts distributed pro-union literature as she waited in line to punch out at the time clock. A supervisor observed her conduct and reported it to Company officials. The following day Roberts was summoned to Ashby's office and reprimanded for violating the Company's rule prohibiting

---

[3] Jones worked as a specialty production man handling custom-built and quality fishing rods (Pet. App. 26).

employee solicitation in working areas during working hours. Ashby warned her not to do it again, and placed a memorandum of the incident in her personnel file. (Pet. App. 18, 30; Tr. 116-118, 120-121, 158.)

On December 15, the day of the election, several girls from the Company's clerical staff, dressed in high boots and mini-skirts, distributed anti-union literature in the vicinity of the plant time clock, at service entrances, and in the cafeteria. The distributions occurred at the beginning of the first shift at 7 a.m., during the lunch period from 11:30 a.m. to 12:30 p.m., and at the beginning of the second shift at 3:45 p.m. The girls wore signs stating, "Yes on mini, no on union"; "be sharp, vote no" and "look sharp, vote no." (Pet. App. 23-24, 18; Tr. 24, 112-113, 136-138, 193-194.)

The Union lost the second election. It filed objections to the election results as well as unfair labor practice charges which were consolidated for hearing. (Pet. App. 20-21.)

B. The Decisions Below

The Board found that the Company violated Section 8(a)(1) of the Act by promising Jones a promotion if he supported the Company against the Union, and Section 8(a)(3) and (1) by denying overtime to Jones on December 14 because he supported the Union (Pet. App. 28). The Board rejected the Company's explanation that Jones was denied overtime because of a material shortage. (Pet. App. 27-28.)

The Board found an additional Section 8(a)(1) violation because employee Roberts was disciplined for distributing union literature. Since the Company had permitted its clerical employees to distribute anti-union literature the next morning at the same location while a shift was punching in, the Board held that, the no-solicitation rule was discriminatorily invoked against Roberts to discourage her union activity (Pet. App. 18). The Board further concluded that, although the granting of the 10-cent wage increase in November was lawful since it was in conformity with the Company's past practice, the announcement of another wage survey at the time violated Section 8(a)(1), since it constituted a departure from past practice and was intended "to convey to employees the expectation of a further increase" and thereby to influence their vote in the scheduled election (Pet. App. 33).[4]

The Board ordered the Company to cease its unlawful conduct, to make employee Jones whole for any loss of overtime pay he may have suffered, and to post appropriate notices, and set aside the election (Pet. App. 19, 36-38). The court of appeals, in all respects material here (see n. 4, *supra*), sustained

---

[4] The Board also found that the Company violated Section 8(a)(1) of the Act by soliciting and utilizing its office clerical employees to distribute anti-union literature to bargaining unit employees, and by a coercive statement made to an employee by one of the clericals while she was distributing anti-union literature (Pet. App. 15-17). The court of appeals overturned these findings (Pet. App. 11-13), and they are not in issue here.

the Board's findings and conclusions, and enforced its order (Pet. App. 3-13).

ARGUMENT

Petitioner's challenge to the Board's order presents essentially only evidentiary issues, and further review is thus unwarranted. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

1. Contrary to petitioner's assertion (Pet. 8-13), the Board's finding of discriminatory application of the no-solicitation rule does not conflict with *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357. There, the Court held that discriminatory application of a rule barring union solicitation by employees during working time is not established merely because the *employer*, by himself or through his supervisory personnel, engages in anti-union solicitation during working time. Nothing in that holding forecloses a finding of discrimination where, as here, the employer permits one group of *employees*, here its clerical employees,[5] to engage in anti-union solicitation during working time, while reprimanding other employees, here employee Roberts, for engaging in pro-union solicitation under similar circumstances.

2. Petitioner challenges (Pet. 13-17) the Board's finding that the announcement of another wage survey was unlawful as in conflict with *National Labor*

---

[5] The employees engaging in anti-union solicitation admittedly did so as employees and not as agents of the employer. See Pet. App. 10.

Relations Board v. *Exchange Parts Co.*, 375 U.S. 405. The announcement of the new survey, the Company argues (Pet. 16), was motivated by the scheduled change in the Federal minimum wage law effective February 1, 1968. The employees, however, were not given this explanation for the new survey, which was contrary to past practice (Pet. App. 32-33; Tr. 143-144). In these circumstances, the Board was warranted in finding that the announcement was in fact motivated by a desire to induce the employees to vote in the Board election against the Union.*

3. Petitioner further contends (Pet. 18-22) that the court below improperly relied on a history of prior interferences with employee rights which had not been finally adjudicated to sustain the Board's unfair labor practice findings. In assessing the Company's motivation for the wage survey announcement, the court remarked that "the record indicates that there was a background of employer interference with the rights of employees" (Pet. App. 6). But the court's opinion makes clear that this reference was merely to the fact that the first election had been set aside following objections by the Union to the Company's pre-election conduct, and that the Company had subsequently engaged in other actions here found to be

---

* *National Labor Relations Board* v. *Gotham Industries*, 406 F. 2d 1306 (C.A. 1), on which petitioner relies (Pet. 14), is factually distinguishable. There, the court found it doubtful that the employer knew a Board election was imminent, and that, in view of the employee threats to leave and the tightening labor market, valid business reasons existed for putting the wage increase into effect immediately. 406 F. 2d at 1310-1312.

unfair labor practices. The unfair labor practice findings with respect to Jones, which petitioner here faults, plainly are grounded upon the ample record evidence summarized above, and not upon prior unadjudicated unfair labor practice charges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

NOVEMBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410010 337